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No. 89-609

In The

Supreme Court of the United States

October Term, 1989

DONALD AND ERNA PUCKETT;
FRED AND VIRGINIA SLAWSON,

Petitioners,

and

ALEXANDRIA AND ESTER KALOA;
ALEC AND OLGA CONSTANTINE

Cross-Petitioners,

vs.

NATIVE VILLAGE OF TYONEK,

Respondent.

CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. May the courts of the United States be used for enforcement of racially discriminatory actions?

PARTIES TO THE PROCEEDING

The parties to the proceeding have adequately been set forth in the Petition for Writ of Certiorari.

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The Opinion of the Ninth Circuit Court of Appeals was filed on November 24, 1989 and has previously been submitted to the Court.

JURISDICTION

The jurisdiction of the Supreme Court of the United States has been correctly invoked.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

The Fifth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

The Kaloas and Constantines write both in court requested response to the Petition for Writ of Certiorari and in support of their Cross-Petition for Writ of Certiorari and concur with the general statement of the case as given by Petitioners Puckett and Slawson and Amicus State of Alaska. Significantly omitted from those recitations, however, is the Kaloas and Constantines role and position in this case.

The Kaloas and Constantines are Athabascan Indians-Alaskan Natives. They are private landlords of the Pucketts and Slawsons. They are owners of the private houses in question. Tyonek brought suit in District

Court seeking declaratory judgment against both landlord and tenant. Tyonek sought to use the courts of the United States to enforce the eviction of the Pucketts and Slawsons and to force the Kaloas and Constantines to rent only to Alaskan Natives. The Kaloas and Constantines did not wish the Pucketts and Slawsons evicted and wish to be able to rent to anyone regardless of race.

Shortly after litigation began in the United States District Court of Alaska, the Kaloas and Constantines filed a motion to dismiss asserting that the courts of the United States could not be used to enforce racially discriminatory actions. The two racially discriminatory acts that Tyonek is seeking federal judicial assistance in enforcing are the eviction of the Pucketts and Slawsons and the prohibition of renting to non Alaskan Natives. The Kaloas and Constantines asked that the District Court rule on this motion to dismiss first before addressing any merits. The Kaloas and Constantines argued that because of the racially discriminatory relief that was being prayed for the District Court should go no further and simply dismiss Tyonek's cause of action outright and not utilize any of the resources of the courts of the United States in furtherance of such a determination. The District Court did dismiss Tyonek's action, but the reason was that there was not federal subject matter jurisdiction. The Kaloas and Constantines motion was functionally denied. Before reaching or even considering the issue of federal subject matter jurisdiction the Kaloas and Constantines contend the Complaint should have been dismissed because the relief prayed for violates the equal protection and due process clauses of the Constitution of the United States.

The Kaloas and Constantines appealed to the Ninth Circuit Court of Appeals. They argued before the Ninth Circuit that the District Court should have dismissed the complaint outright because the relief complained of was violative of the due process and equal protection clauses of the United States Constitution. The Ninth Circuit Court of Appeals ruled that the Kaloas and Constantines did not have standing to appeal because, in their words, "they were successful in obtaining a dismissal in the District Court". But the Kaloas and Constantines were *not* successful in obtaining the dismissal they sought. The dismissal they sought was that the claims of Tyonek should not be considered at all because the relief sought was violative of the Constitution of the United States. The Kaloas and Constantines briefed this issue to the Ninth Circuit, appeared and argued, and requested rehearing on that issue.

Subsequently, the Ninth Circuit Court of Appeals reversed the District Court, finding that there *was* in fact subject matter jurisdiction. This reversal again in effect functionally denied the Kaloas and Constantines argument that before any such consideration be made a determination must be accomplished that the relief prayed for was not violative of the Constitution of the United States.

The Ninth Circuit action, if allowed to stand, leaves the Kaloas and Constantines in judicial limbo without a remedy and makes the courts of the United States a party to racial discrimination. The Kaloas and Constantines believe that Tyonek's case should never have been heard at all by the District Court or the Court of Appeals. The District Court dismissed on other grounds and the Court

of Appeals reversed holding that the Kaloas and Constantines had no standing to appeal even though their interests were adversely and dramatically affected by the reversal.

The Kaloas and Constantines desire that this Court consider the question of whether the courts of the United States may entertain a case wherein the relief requested violates the equal protection and due process provisions of the Constitution of the United States.

The Kaloas and Constantines believe that they are presently legally entitled to present this argument to this Court in the event that Certiorari is granted to the Pucketts and Slawsons. Alternatively, the Kaloas' and Constantines' Cross-Petition for Certiorari.

REASONS FOR GRANTING THE WRIT

The Kaloas and Constantines believe that certiorari should be granted for the reasons set forth in the petition for certiorari filed by the Pucketts and Slawsons and as amplified by Amicus State of Alaska.

The Kaloas and Constantines also believe the certiorari should be granted for the following reasons:

INTRODUCTION TO ARGUMENT

Tyonek sought an order from the District Court evicting the Slawsons and the Pucketts from their lawful possession of the private residences owned by the Kaloas and the Constantines. Tyonek also sought an order

enjoining the Kaloas and the Constantines from leasing their houses to any non-Native persons in the future. Tyonek based its action on a certain restrictive covenant found in an ordinance of the Village which provides:

> No. 4: Any white men except government men or outsider coming in is allow to stay only 24 hours. If weather permits them to go. And is not allowed to bring any Liquor. Article No. 4 have to be put up in posters. And anyone destroying these papers will be subject to penalty. Twenty-five dollars fine if caught destroying the poster. [sic] Rules for Laws, of Native Village of Tyonek (May 18, 1942).

The ordinance purports to limit the rights of the Kaloas and the Constantines to lease their houses. These limitations are based entirely on the race of the tenants to whom the Kaloas and the Constantines have leased and wish to lease in the future. In seeking to enforce these racially discriminatory restrictive covenants Tyonek wishes to invalidate existing legal agreements in the form of leases freely made between the parties, the Kaloas and the Pucketts, the Constantines and the Slawsons.

The deposition of Donald Standifer, President of the Tyonek Village Council, was obtained and submitted to the District Court. Standifer confirmed that the only reason eviction was being sought of the Pucketts and the Slawsons was because they are white and that the Village Council was seeking an injunction to prevent the Kaloas and the Constantines from renting to whites in the future. Standifer Depo. at 58-61. Specifically, Tyonek asked the District Court to judicially enforce racially restrictive provisions and covenants:

Q What is it that you're asking the court to do in this lawsuit that you filed?

A We're asking that they evict these people.

Q Evict the Slawsons and the Pucketts?

A That's correct.

Q And are you also asking that the Constantines and the Kaloas be prohibited from renting to whites?

A Well, to be in conformance with the Resolution 65-32, to confirm with it. It's the restrictions for all the families.

Q All right. My question is: is it – which I assume that you have answered indirectly in the affirmative – but is it true that you're asking the court to prohibit the Constantines and the Kaloas from renting to whites?

A Renting to non-members of the tribe.

Q And that would include whites, blacks, orientals, anyone else; is that correct?

A Yeah.

Deposition of Donald Standifer at pp. 55-63.

The precise legal status of Tyonek is irrelevant to the Kaloas and the Constantines' position. Irrespective of whether Tyonek has the powers of a separate nation, an ancillary government, or is a unique entity, the relief Tyonek seeks is unconstitutional. No one or no thing may use the courts of the United States to enforce actions which violate the Constitution of the United States. The District Court and the Court of Appeals should have dismissed on this basis.

The reason that Tyonek wishes the Pucketts and the Slawsons out of Tyonek and a prohibition against the

Kaloas and Constantines from renting their property to non-Natives is for the admitted purpose of maintaining racial purity. The cleansing action sought is not because the Pucketts and the Slawsons have done anything other than be the wrong color. Their conduct is not objected to, only their status. They have not in any manner violated Village ordinances or in any other way attacked or infringed upon the culture or practices of the people of Tyonek.

Tyonek asks the Courts of the United States to accept and enforce the thesis that the mere presence of persons of another race will compromise an entire social order and accordingly use its judicial power to eject persons because of their racial status. The Kaloas and the Constantines believe that an assertion of this nature should not and cannot be tolerated in any court of the United States.

Certainly there are many reasons relating to authority, jurisdiction, the Alaska Native Claims Settlement Act, and the Indian Civil Rights Act as to why and how Tyonek does not have the power to implement such a practice of racial purification and seek judicial enforcement thereof. These reasons are amply detailed in the Pucketts' and the Slawsons' filings with this Court. The Kaloas and the Constantines endorse and adopt by reference these positions as well. The Kaloas and the Constantines believe, however, that this court should directly address the issue of judicially enforced racial discrimination squarely and not invalidate Tyonek's assertions simply for technical reasons.

The Kaloas and Constantines assert that this action should have been dismissed below with prejudice on three separate grounds:

1. The United States Supreme Court has long held the judicial enforcement of racially discriminatory restrictive covenants amounts to governmental action in violation of the Equal Protection and Due Process clauses of the Fifth and Fourteenth Amendments of the Constitution of the United States. *Shelley v. Kraemer*, 334 U.S. 1 (1948). This rule abides even though the racially discriminatory restrictive agreements are made between two entirely private parties. Accordingly, federal courts may not grant the injunctive and declaratory relief sought by Tyonek since such action would amount to judicial enforcement of racially discriminatory restrictive ordinance in violation of the United States Constitution.

2. Notwithstanding that Indian tribes may have retained varying degrees of sovereignty, such is subject to complete defeasance by acts of Congress. *United States v. Wheeler*, 435 U.S. 313 (1978). Consequently, when Congress exhibits the intent to apply certain restrictions on Indian tribes, tribal action is limited by these restrictions. Among the restrictions which Congress has placed on tribal action is the Indian Civil Rights Act, 25 U.S.C. § 1302. This action should have been dismissed with prejudice below because the relief sought violates the Equal Protection and Due Process clauses of that act, 25 U.S.C. § 1302(8).

3. Indian tribes are also subject to certain federal legislation which applies to wholly private as well as

governmental action. Indian tribes may not act in contravention of the Thirteenth Amendment to the Constitution of the United States and enabling legislation enacted pursuant to the thirteenth amendment. *In re Sah Quah*, 31 F. 327 (D. Alaska 1886). The relief sought is in violation of the Civil Rights Act of 1886 (42 U.S.C. § 1982) which was enacted to effectuate the Thirteenth Amendment, requiring dismissal with prejudice below.

GRANTING TYONEK THE RELIEF IT SEEKS WILL AMOUNT TO JUDICIAL ENFORCEMENT OF RACIALLY RESTRICTIVE ORDINANCES IN VIOLATION OF THE UNITED STATES CONSTITUTION.

By seeking injunctive relief to force the Kaloas and the Constantines to evict the Pucketts and the Slawsons and not rent to non-Natives, Tyonek is seeking judicially enforced racial restriction. The facts of this action are strikingly similar to those of *Shelley*. In *Shelley*, respondents had sought judicial enforcement of restrictive covenants whose purpose was the exclusion of blacks from the ownership or occupancy of the particular real property in question. The state supreme courts of Mississippi and Michigan had granted the relief requested, but on appeal, the United States Supreme Court reversed.

Appellants there claimed that judicial enforcement of racially discriminatory restrictive covenants violated the Due Process and Equal Protection clauses of the fifth and fourteenth amendments. In accepting this argument, the Supreme Court noted that the covenants did not proscribe a particular use of the property, but rather prohibited occupancy by a particular class of persons. 334 U.S.

at 10. Also significant was the court's conclusion that these racial restrictions, even if imposed by State statute or ordinance, would violate the fourteenth and fifth amendments. 334 U.S. at 11. The central issue in the case was whether judicial enforcement of restrictive covenants amounts to action so as to invoke the force of these amendments. "That the action of state courts and of judicial officers in their official capacities is to be regarded as action of the state within the meaning of the fourteenth amendment, is a proposition which has long been established by decisions of this court." 334 U.S. at 14. Accordingly, when private agreements which might be valid in and of themselves are enforced by the courts, they are subject to the limits imposed by the fourteenth and fifth amendments. Similarly, even if Tyonek has the authority to adopt such a racially discriminatory ordinance, it cannot have the courts of the United States enforce it.

The court in *Shelley* was careful to distinguish between mere abstention from action by the courts and cases where the State makes available "the full coercive power of the government in order to deny the enjoyment of property rights on the grounds of race or color." 334 U.S. at 19. The state supreme court decisions which were overturned in *Shelley* did not simply allow the parties to impose discriminatory restrictions as they saw fit. They did much more.

> The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desired to establish homes. The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. It is clear that but for the active intervention of the State courts, supported by the full

> panoply of state power, petitioners would have been free to occupy the properties in question without restraint.

334 U.S. at 19. That description of the situation in Shelley is very similar to the circumstances before this court. The Pucketts and the Slawsons are willing tenants, in occupancy of the premises. The Kaloas and the Constantines are willing landlords. Unless this court intervenes and grants the relief requested with the power of the federal government, the Pucketts and the Slawsons will be free to continue occupying the properties in question and the Kaloas and the Constantines will be free to continue leasing their houses. As in *Shelley*, it is only through the coercive power of the court that Tyonek will be able to enforce the invidious racially discriminatory restrictive ordinance it seeks to impose. Unless this action is dismissed with prejudice, this court will allow the power of the federal judiciary to be used in violation of the Fifth and Fourteenth Amendments of the United States Constitution.[1]

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[1] In *Hurd v. Hodge*, 334 U.S. 28 (1948) this Court expanded *Shelley* to apply to the judicial enforcement of racially discriminatory covenants by federal courts.

CONCLUSION

Tyonek seeks to use the courts of the United States to evict whites from private property simply because of their race and to prevent Alaska Natives from renting their private property to non-Natives. Presumably such an affirmative ruling would be enforced by United States Marshals and the District Courts contempt powers. The Kaloas and Constantines desire to appear before this court and argue that because of the invidious relief requested by Tyonek the courts of the United States should not hear this cause at all.

RESPECTFULLY SUBMITTED this 22nd day of February 1990.

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